

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

Franklin Park

PACTIV CORPORATION¹

Employer

and

Case 13-RC-21496

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on this petition was held on May 26, 2006 before a hearing officer of the National Labor Relations Board, herein referred to as the Board, to determine whether it is appropriate to conduct an election in light of the issues raised by the parties.²

I. Issues

The International Association of Machinists and Aerospace Workers (herein “Petitioner”) petitioned for an election within a unit comprised of all full-time and regular part-time production and maintenance workers employed by Pactiv Corporation (herein “Employer”) at its facility located in Franklin Park, Illinois (herein “Employer’s facility”).

At the hearing, the parties agreed to the inclusion of the following job classifications in an appropriate bargaining unit: tooling department employees, set up department employees, quality department employees, and warehouse employees. The parties agreed to exclude plant clerical employees and warehouse clerical employees from the unit. In addition, the Employer raised a concern involving the status of “team leaders,” asserting that the team leaders were Section 2(11) supervisors. The Petitioner agreed with the Employer’s position and the matter was not litigated at the hearing.

¹ The name of the Employer was amended at the hearing to reflect its full legal name.

² Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

In addition to its regular employees, the Employer uses the services of temporary employees (herein “temps”) whom the Employer obtains from Kelly Services (herein “Kelly”). The parties are in agreement that if the temps are found to be solely employed by the Employer they share a community of interest with the regular employees and should be included in the unit. On the other hand, the parties agree that if the temps are found to be jointly employed by both the Employer and Kelly or solely by Kelly, then they should be excluded from the bargaining unit. However, the Employer refused to take a position with respect to its status as the sole or joint employer of the temps. The Petitioner contends that the temps are solely employed by Kelly and should be excluded from the unit. The parties did not present any other issues at the hearing. Thus, the only issue to be determined concerns the status of the Employer and Kelly as the employing entity of the temps.

II. Decision

Based on the entire record of this proceeding and for the reasons set forth below, I find that the Employer is not the sole employer of the temps, and I find that the petitioned-for unit as modified by agreement of the parties at the hearing, excluding the temps, is an appropriate unit for collective bargaining.

Accordingly, IT IS HEREBY ORDERED that an election be conducted under the direction of the Regional Director for Region 13 in the following bargaining unit:

All full time and regular part time production and maintenance employees, tooling department employees, set up department employees, quality department employees, and warehouse employees currently employed by the Employer at its facility currently located at 2607 25th Avenue, Franklin Park, Illinois; but excluding all office, plant, and warehouse clerical employees; professional employees; managerial employees; guards and supervisors as defined by the Act.

III. Statement of Facts

A. The Employer's Operation

The Employer is engaged in the production of various types of plastic products including containers, plates and bowls from its facility located in Franklin Park. The employees are organized into several departments: extrusion, thermoforming, maintenance, set up, tooling, quality, warehouse and the office administrative staff. There are three shifts on weekdays and two weekend shifts in operation. There is a plant manager who oversees the entire operation. Below the plant manager and reporting to him is a production manager who is responsible for the extrusion, thermoforming, tooling and quality departments; a logistics manager who oversees the warehouse department; a technical manager who is in charge of the maintenance department; and a human resource manager. A controller handles all of the financial affairs at the facility and a purchasing supervisor oversees all purchases. Also, there is an EH&S manager and plant

scheduler.³ On each shift in the various departments, a team leader supervises the employees. If the team leader is absent, there is an individual in each department referred to as a “natural team leader” who acts as a back-up to the team leader. In addition to the team leaders, there are two production supervisors who are responsible for the second and third shift thermoforming department operations. The team leaders and the production supervisors report to the production manager. The departments are housed in one building which includes an office reserved for use by the Kelly on-site manager.

The extrusion department takes raw material and heats it to the melting point to then produce 3000 pound rolls of plastic sheet of various thicknesses. There are six production lines in the extrusion department which are manned by employees in several job classifications. The Operator B employees set-up and start up the production line and when finished change the line for new product. The Operator A employees are the material handlers for the extrusion department. They operate crystallizers and dryers, insure the storage silos are filled with the raw material, and perform other tasks related to material handling. There are LTO's (lift truck operators) who take the rolls from the extrusion line and transport them to storage or to the thermoforming department. Employees in these job classifications perform the same duties on all shifts.

The thermoforming department uses the plastic rolls produced by the extrusion department to feed through the machines that heat and press the material to form the containers. Once formed the containers are sent to the trimming department where they are cut into finished product, wrapped, boxed, and transported to the warehouse or other outside locations. The Operator B employees run the production equipment by setting the plastic rolls on the machine, feed it through the machine. They also perform checks of the machine temperature and quality of the product. The packaging equipment operator operates the packaging equipment and troubleshoots problems with the conveyor system and packaging equipment. The operator A employees work in front of the thermoforming equipment and take the finished product from the machine, inspect it for quality, insure an accurate count of product and places it into sleeves of bags which are then placed in boxes. The boxes are then sealed and placed on the conveyor belt or on skids for the material handlers. LTO's (material handlers) take the skids of finished product to the warehouse for shipping. Like the extrusion department, employees perform these job functions on all shifts. The first shift, however, also has set-up employees and an inventory control person. The set up employees use hand and power tools to changeover the tools used on the thermoforming lines depending on the product to be made.

The maintenance department includes maintenance mechanics that perform mechanical and electrical repairs on the equipment and do building maintenance on the production floor. The stockroom person replenishes parts and components for the production line. There are operator A employees who perform janitorial duties in the building. The tooling department prepares tools for use or storage and can modify tools by machining them.

The quality department supports the extrusion and thermoforming departments. Quality department employees inspect the production lines to insure the product is correct and keep files

³ The record does not contain details concerning the job duties and responsibilities of the EH&S manager or the plant scheduler.

and specification sheets for the various products. Occasionally, they will use a computer based system – QAS – to generate specifications for new products.

The warehouse department employees are classified as LTO I's and III's. They use RF scanners to scan product into and out of the warehouse and to load and unload trucks.

In addition to regular employees, the Employer uses temporary employees supplied by Kelly in various departments who have the same skills, education, training, and experience and perform the same jobs under the same supervision as the regular employees (herein "regulars").

B. The Regular Employees.

The Employer obtains its regular employees from the ranks of the temps supplied to it by Kelly. The regulars are paid higher wages and receive various benefits such as safety awards, medical, dental, and optical insurance, 401(k) plan, short and long-term disability insurance, life and supplemental life insurance, accidental death and dismemberment insurance, holiday pay, vacation pay, jury duty pay, workers comp and participation in an EAP. The regulars use "swipe badges" to punch in and out of work. They receive their paychecks from the Employer. The Kelly on-site manager has no authority or responsibility over the regular employees.

C. The Temporary Employees.

The Employer is currently using approximately 40 temps to supplement its workforce. The temps are obtained from Kelly pursuant to a national agreement between the Employer and Kelly Services⁴. The Kelly on-site manager maintains job descriptions in his own files at the Employer's facility. When a team leader needs to fill a position, he completes an assignment request form and submits it to the Kelly manager. The Kelly manager then recruits, interviews and screens applicants and places them into the position. Kelly provides orientation and initial safety training to the temporary employees and assigns them to work a specific shift. The Employer cannot request a specific individual by name to be supplied to it by Kelly. If there are attendance or performance issues, the team leaders notify the Kelly on-site manager who counsels the temp. If the Employer's team leader wishes to terminate the services of a specific temp, he completes a form that requests the termination of assignment of the temp. Kelly then may terminate the temp or place the temp at another location.

The temps are paid lower wages than the regulars. The Employer pays a premium "mark-up" fee based on the temps' hourly rate that is established from year to year by agreement with Kelly. Temps supplied by Kelly do not receive any of the benefits that the Employer provides to its regular employees. Rather, the temps receive benefits from Kelly. The temps are directed and supervised by the Employer while at work and use the same facilities and equipment as the regulars. They work along side the regulars and use the same swipe badges as

⁴ Although this Agreement is relevant to the issue concerning the Employer's status as the employer of the temps and its production was requested by the Hearing Officer, the Employer was unable to provide the document during the hearing or thereafter despite the record being kept open for one week following the close of the hearing. Although it is likely that the document would have probative value, its absence from the record does not prevent a determination in this matter. In light of my findings, this issue is moot.

the regulars to record their work time. This information is maintained on the Employer's computer system and is then electronically transmitted at the end of a pay period to Kelly who generates paychecks for the temps. Temps must call the Employer and notify Kelly when they will be absent. Time off is arranged in a similar fashion. Kelly provides the workers comp insurance for the temps. Temps, like regulars, can move from one job to another and ultimately temps can become a regular employee of the Employer. However, although temps work under the same working conditions as the regulars, they are maintained on a separate seniority list.

IV. Analysis

The record evidence demonstrates that there are three possible employing entities for the temps in this case: the Employer, the Employer and Kelly as joint employers, or Kelly. However, the Employer asserts that unless the temps are found to be solely employed by the Employer they should be excluded from the bargaining unit. The Petitioner agrees with this position. The parties agreement to exclude the temps unless they are solely employed by the Employer conforms to the Board's holding in *H.S. Care L.L.C. d/b/a Oakwood Care Center*, 343 NLRB No. 76 (2004). Thus, the only issue that must be decided is whether the temps are solely employed by the Employer.

A. Employer status

Under Section 2(2) of the Act, employer status over a given group of employees turns on the right to control essential terms and conditions of employment for those employees and involves such factors as who has the power to hire and fire, who has the authority to determine compensation, who has the right to direct the employees work, who has control of the premises where the work is performed, and who has responsibility for labor affairs and labor relations. *N.L.R.B. v. New Madrid Manufacturing Co.*, 215 F.2d 908 (8th Cir. 1954). The touchstone for finding employer status is control over employees working conditions. *American Air Filter Co.*, 258 NLRB 49, 52 (1981). When two or more employers share or codetermine matters governing essential terms and conditions of employment, the Board finds them to be joint employers for those employees. *H.S. Care L.L.C. d/b/a Oakwood Care Center*, *supra*; *Engineered Storage Products Co.*, 334 NLRB 1063 (2001); *NLRB v. Browning Ferris Industries*, 691 F.2d 1117, 1123 (3rd Cir. 1982); *Riverdale Nursing Home*, 317 NLRB 881 (1995). In *Laerco Transportation*, 269 NLRB 324 (1984), the Board defined the essential terms and conditions of employment as those involving such matters as hiring, firing, disciplining, supervision and direction of employees.

Based on the record, and after due consideration of the Employer's post-hearing brief, I find that the Employer is not the sole employing entity of the temps. Rather, it appears that the temps are jointly employed by the Employer and Kelly. It is clear from the record that the Employer and Kelly are two separate legal entities. The record shows and I find that the temps work under the direct day-to-day supervision of the Employer in the same building, on the same work shifts, use the same equipment, and perform the same job duties using identical skills as the regulars. However, the record also shows and I find that the power to hire, fire, and discipline the temps resides with Kelly who recruits them to fill positions requested by the Employer. Kelly is required to deal with problem employees and remove them from their work assignments

with the Employer in cases of absentee and performance problems. The Employer cannot determine or involve itself with continued future employment of the temps with Kelly. Furthermore, based on the record, I find that the wage rates for the temps, which are lower than for the regulars in the same job classifications, are co-determined by the Employer and Kelly while Kelly alone determines the benefits, if any, the temps receive. Kelly issues paychecks to the temps and is responsible for all other payroll matters for the temps whereas the Employer handles these matters separately for the regulars. Thus, based on the entire record, I find that the Employer does not have sole responsibility for labor affairs and labor relations with respect to the temps.⁵ Rather, Employer and Kelly are joint employers of the temps at the Employer's facility. Consequently, I find that the temps should be excluded from the appropriate bargaining unit. *See, Oakwood Care Center, supra; Engineered Storage Products Co., supra.*

B. The appropriate unit

Based upon the facts contained in the record and the agreement of the parties concerning the appropriateness of the unit excluding the temps, I find that the unit sought by the Petitioner as modified at the hearing is an appropriate unit and I shall direct an election therein. *Septix Waste, Inc.*, 346 NLRB No. 50, fn.8 (2006); *Red Coats, Inc.*, 328 NLRB 205, 207 fn. 20 (1999).

V. Direction of Election

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

VI. Notices of Election

⁵ In *Oakwood Care Center*, 343 NLRB No. 76 (2004), the Board held that combined units of solely and jointly employed employees are multiemployer units and are statutorily permissible only with the parties' consent. In light of my findings and disposition of the issues in this matter, I need not reach any issue concerning participation by Kelly in this proceeding or its consent to be included as a joint employer of the employees in the appropriate unit.

Please be advised that the Board has adopted a rule requiring election notices to be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to 12:01a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VII. List of Voters

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). The Regional Director shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, 209 South LaSalle Street, 9th Floor, Chicago, Illinois 60604, on or before **June 16, 2006**. No extension of time to file this list will be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VIII. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC 20005-3419. This request must be received by the Board in Washington by **June 23, 2006**.

DATED at Chicago, Illinois this 9th day of June, 2006.

Harvey A. Roth, Acting Regional Director
National Labor Relations Board
Region 13
209 South LaSalle Street, 9th Floor
Chicago, Illinois 60604

CATS - VEIOt (Voter Eligibility –Other)

177-1650-0000-0000

362-6718-0000-0000

420-7300-0000-0000

460-5067-7000-0000

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